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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Appellant,

v.

ALDO PORTILLO,

Defendant and Respondent.

B203785

(Los Angeles County
Super. Ct. No. TA061214)

APPEAL from an order of the Superior Court of Los Angeles County. Richard G. Berry, Judge. Order vacated and matter remanded for further proceedings.

Steve Cooley, District Attorney, Phyllis C. Asayama, Roberta Schwartz and Patrick D. Moran, Deputy District Attorneys, for Plaintiff and Appellant.

Cynthia A. Thomas and Jill Ishida, under appointments by the Court of Appeal, for Defendant and Respondent.

Aldo Portillo successfully moved to have his arrest records sealed and destroyed pursuant to Penal Code¹ section 851.8. The District Attorney appeals. We remand the matter to the trial court for a new hearing on the petition.

FACTUAL AND PROCEDURAL BACKGROUND

A felony complaint for an arrest warrant filed in July 2001 alleged that Portillo had committed attempted murder (§§ 187, 664); stalking in violation of a court order (§ 646.9, subd. (b)); criminal threats (§ 422); infliction of corporal injury on a former cohabitant (§ 273.5, subd. (a)); first degree burglary (§ 459); and first degree residential robbery (§ 211). The minute order concerning the issuance of the arrest warrant refers only to the first four charges; those four charges are later listed on a minute order as having been dismissed at the preliminary hearing. The record is not clear concerning what happened to the burglary and robbery charges; however, it is clear that all charges against Portillo were dismissed after a preliminary hearing in August 2001 based upon the insufficiency of the evidence.

In June 2007, Portillo filed a petition to seal and destroy the records of his arrest pursuant to section 851.8. The court granted the motion after a hearing. The District Attorney appeals.

DISCUSSION

I. Good Cause

Section 851.8, subdivision (c), provides that “where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the

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All further statutory references are to the Penal Code.

defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made.” Although subdivision (c) contains no time limitation, section 851.8, subdivision (l) provides that petitions for relief under section 851.8 may be filed up to two years from the date of arrest or the date of the filing of the accusatory pleading, whichever is later. The statute also provides, “Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice.” (§ 851.8, subd. (l).) The District Attorney contends that the petition to seal and destroy Portillo’s arrest records was improperly granted because Portillo did not show the required good cause for a delay of almost six years in filing the petition.

Portillo’s initial petition did not assert that good cause existed for filing the petition outside the two years provided by section 851.8, subdivision (l). After the District Attorney contended in opposition that there existed no good cause, Portillo’s counsel offered in his reply brief three explanations for his delay in filing his petition under this section: first, that he waited for the statutes of limitations on the offenses to run to be sure that charges would not be filed; second, that he has a juvenile son with the same name and does not want his son to suffer prejudice because he was accused of a crime; and third, that he had not filed sooner because he had wanted to avoid any contact with his former girlfriend, the alleged victim in the underlying case, but that in light of recent statements by the girlfriend that he had committed the underlying offenses, he now believed it necessary to obtain a declaration of factual innocence. There was no declaration by Portillo testifying to these explanations; trial counsel merely included a footnote explaining that he was too busy to obtain a declaration because of an unrelated trial and offering to file a supplemental declaration later if the court wished. No supplemental declaration is included in the record on appeal. At the hearing on the petition, Portillo’s counsel (who is not his counsel on appeal) attributed the delay to waiting until the statutes of limitations had expired.

The trial court did not make an explicit finding of good cause in its ruling. It merely signed a form order and marked the box reading, “Petition Granted.” The court did not complete the section of the form where a court could designate that it waived the time restriction on filing under section 851.8, subdivision (l). Ordinarily we would consider the court’s ruling on the motion to have included an implicit ruling that Portillo had demonstrated good cause for the delay that we would then review, but as we must remand this matter to the trial court for the application of the proper legal test, the remand also offers the trial court the opportunity to make explicit that it considered and ruled upon the questions of good cause and prejudice.

II. Determination of Factual Innocence

Section 851.8, subdivision (b) precludes the trial court from granting a petition to declare a defendant’s factual innocence “unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.” On review of a trial court ruling on a motion under this statute, “although the appellate court should defer to the trial court’s factual findings to the extent they are supported by substantial evidence, it must independently examine the record to determine whether the defendant has established ‘that no reasonable cause exists to believe’ he or she committed the offense charged.” (*People v. Adair* (2003) 29 Cal.4th 895, 897.)

The trial court here undertook to determine whether there was reasonable cause to believe that Portillo committed the offense or offenses for which he was arrested, and attempted to determine what offense or offenses were at issue. The court commented, “The question is: At the time of the arrest, was there probable cause for the arrest. And that’s the only issue.” The court asked, “[A]t the time the arrest occurred, was [attempted murder] the only possible crime?” Portillo’s trial counsel advised the court that “the detective arrested him for the attempted murder and then additional charges were added later on.” The court pressed the point: “When the arrest occurred and the police report was made out, I’m sorry, the arrest report was made out, what violation of [the Penal

Code] did the officer indicate?” Trial counsel responded, “Attempted murder, Your Honor.” The court inquired of the prosecutor whether this was correct, but the prosecutor did not know: “Judge, I don’t know because—I—because the defendant—there was an arrest warrant when he was initially arrested.” Portillo’s trial counsel soon reiterated, “Your Honor, the only charge at that time was the attempted murder that the officer arrested my client on.” The court clarified, “All the other stuff came up later, correct?” Counsel responded, “Right.” In light of these factual representations made to the court, it appears that the trial court proceeded on the understanding that the only offense for which Portillo was arrested was an attempted murder charge.

It is difficult from the record provided to us to determine for what offense or offenses Portillo’s arrest was made. No documentary showing appears to have been made in the trial court of what offenses Portillo was arrested on, and none appears in the record prepared for the appeal. It appears clear from the record that Portillo was not arrested in 2000 when the motor vehicle incident occurred that formed the basis of the attempted murder charge, as two documents in the record on appeal state that no arrest was made at the time.

In his petition for declaration of factual innocence, Portillo declared that he was arrested August 5, 2001, for attempted murder, and as noted above, his counsel in the trial court represented to that court that the initial arrest was for attempted murder alone, with other charges added later. This account, however, does not appear consistent with documents submitted by the District Attorney with his motion to augment the record. We granted the motion to augment the record with a certified copy of the felony complaint sworn out for an arrest warrant and the minute orders from the trial court proceedings. According to those documents, on July 31, 2001, a felony complaint for an arrest warrant was filed (although the complaint submitted to this court was not signed) alleging six counts: attempted murder (§§ 187, 664), stalking (§ 646.9, subd. (b)), criminal threats (§ 422), corporal injury to a former cohabitant (§ 273.5, subd. (a)), first degree burglary (§ 459), and first degree residential robbery (§ 211), all of which were alleged to have taken place between August 5, 2000 and July 21, 2001.

A minute order of August 1, 2001, states that the case was filed on July 31, 2001, and that the complaint alleged four counts: attempted murder (§§ 187, 664), stalking (§ 646.9, subd. (b)), criminal threats (§ 422), and inflicting a corporal injury on a spouse (§ 273.5, subd. (a)). This minute order states that the arrest warrant was issued on August 1, 2001. At the preliminary hearing the trial court dismissed the entire case, apparently consisting of four counts. In light of the assertion of six charges in the complaint for the arrest warrant, the recitation of four charges in the minute order concerning the arrest warrant, the apparent fact that Portillo was not arrested until after the arrest warrant issued, and the determination at the preliminary hearing that there was insufficient evidence to proceed on the four counts, it appears that Portillo was arrested on more than the one offense of attempted murder.

These documents do not appear to have been provided to the trial court at the time of the hearing on the motion to seal and destroy the arrest records. Understandably, the trial court proceeded on Portillo's counsel's apparently erroneous representation that the arrest was for attempted murder alone. The trial court therefore considered only whether there was probable cause to arrest Portillo for attempted murder, not whether there existed probable cause to arrest him on the remaining counts. Because the inaccurate information prevented the trial court from undertaking the proper and full analysis under section 851.8, subdivision (b), we remand the matter to the trial court to allow it to ascertain the offenses for which Portillo was arrested and then to determine whether there was reasonable cause to believe Portillo committed the offense or offenses for which he was arrested. (§ 851.8, subd. (b).)

DISPOSITION

The order to seal and destroy the arrest records is vacated and the matter remanded to permit the trial court to conduct a new hearing on the petition.

ZELON, J.

We concur:

WOODS, J., Acting P. J.

JACKSON, J.